

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

KBPS PUBLIC RADIO FOUNDATION

Employer

and

Case 36-RC-6244

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 48,
AFL-CIO, CLC

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record¹ in this proceeding, the undersigned makes the following findings and conclusions.²

I) SUMMARY

The Employer operates a listener-supported radio station which broadcasts classical music and programming in Portland, Oregon. The Petitioner filed the instant petition³ seeking to represent all regular part-time and full-time employees employed by the Employer, including clerical employees and plant clerical employees but excluding the sales personnel, guards, and supervisors as defined in the Act.⁴

The parties disagree whether the positions of Public Relations/Volunteer Coordinator,⁵ Customer Service Representative, and Membership Manager should be included in the unit.

¹ During the representation hearing in this matter, the parties orally argued their positions and waived the filing of briefs.

² The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

³ The Petitioner amended the original petition filed February 27, 2004 during the hearing. This unit description reflects the amended petition.

⁴ During the hearing, the Employer and the Petitioner stipulated to include in the unit all production and technical employees, including hosts, engineer/chief engineer, producers, music coordinators, and traffic/operations employees, based on a community of interest in wages, hours, and working conditions.

⁵ Although the position of Public Relations/Volunteer Coordinator was used throughout the hearing to refer to the same position, Employer's Exhibit 4 also uses the title "Program Information Coordinator," to refer to the Public Relations/Volunteer Coordinator position.

The Employer contends that these positions are all office clerical employees and, therefore, should be excluded from the unit. The Petitioner contends that the positions are part of the production staff and are, thus, plant clericals who should be included in the unit. In the event the undersigned does not find them to be plant clericals, the Petitioner argues that they are office clericals with a sufficient community of interest warranting their inclusion in the unit.

The parties further disagree whether the Development Director is a supervisor within the meaning of Section 2(11) of the Act. The Employer contends that the Development Director is a supervisor while Petitioner argues that he is not a supervisor within the Act. Regardless, the parties stipulated to exclude the Development Director from the unit based on a lack of community of interest with the petitioned-for unit, but request a determination on the supervisory issue.⁶

Based on the record evidence and the arguments presented by the parties, I have found that the Public Relations/Volunteer Coordinator, Customer Service Representative, and Membership Manager are neither office clericals nor plant clericals. Rather, these employees are an integral part of a plant-wide unit, which is presumptively appropriate for collective-bargaining purposes. Therefore, I shall include the Public Relations/Volunteer Coordinator, Customer Service Representative, and Membership Manager in the unit.

With regard to the Development Director, I have found that the Employer has met its burden of proving that he is a supervisor within the meaning of Section 2(11) of the Act. Accordingly, he is excluded from the plant-wide unit.

Below, I have set forth the evidence, as revealed by the record in this matter, relating to background information on the Employer's operations and relating to the duties and responsibilities of the Public Relations/Volunteer Coordinator, Customer Service Representative, Membership Manager, and Development Director. Following the evidence section is my legal analysis of the evidence, my conclusion and direction of election.

II) EVIDENCE

A) Background Information about the Employer's Operations

On December 16, 2003, the Employer purchased assets of KBPS FM Public Radio ("KBPS"), a listener-supported radio station, from School District 1 of Multnomah County, Oregon ("Portland Public Schools"). Prior to the Employer's purchase of KBPS, the District Council of Trade and Service Unions of School Employees ("DCTSU") represented the production and technical employees who were covered by a collective bargaining agreement, which by its terms is effective from July 1, 1999 through June 30, 2004. Included in the unit were the production assistant, technical assistant, production manager, assistant engineer, and chief engineer. During the term of the contract between Portland Public Schools and DCTSU, IBEW Local 48 represented these employees for grievances and other matters, but did not "officially" represent them. The Employer stated that IBEW Local 48 is a member of DCTSU. Upon the acquisition of KBPS by the Employer, DCTSU terminated its representation of the production and technical employees.⁷ Since the Employer's purchase of the station, IBEW Local 48 has claimed to represent the employees previously represented by DCTSU.

⁶ I find it appropriate to address the Development Director's supervisory status because Perin is potentially part of a broader plant-wide unit.

⁷ During the hearing, Suzanne White, the General Manager, testified that DCTSU could no longer represent "private" employees but did not provide further evidence surrounding the reasons for the termination of the labor agreement between DCTSU and the Portland Public Schools.

Prior to the Employer's purchase of KBPS, the Portland Federation of Teachers and Classified Employees ("PFTCE") represented all the Development employees at KBPS, except for Suzanne White, the General Manager and Acting Program Director,⁸ Mark Perin, Development Director, and the Underwriting Coordinator (sales employee). The collective bargaining agreement between PFTCE and Portland Public Schools ran from July 1, 2001 through June 30, 2003. However, PFTCE no longer represents these employees. The record is unclear regarding discontinued representation by PFTCE but the Employer suggests that it is because PFTCE does not represent private sector employees. The record indicates that neither PFTCE nor DCTSU has any interest in representing those employees in the future. Presently, there is no collective bargaining agreement in effect with KBPS.

The Employer currently rents its 2600 square foot facility from Portland Public Schools who owns the building in which the station is housed. The Employer organizationally has divided its operations into the following components: an administrative/business division, which is housed at the front of the facility, and a production/technical division, which is housed in the back. The employees refer to these two areas as the "front office" and "back hall," respectively. All employees share use of the conference room, bulletin board, restrooms, coffee and supplies area, phone system, building entry, and two hallways connecting the front office and back hall. There are six parking stalls used by all employees. The Music Library, located in the FM control room, is utilized solely by the Engineering and Programming employees and by volunteers.

KBPS broadcasts music and communicates with listeners for input, suggestions, and financial support to keep the station in operation. It contracts out the AM station to the Portland Public Schools.⁹ As a listener-supported station, services to the membership are critical to the station's operation.¹⁰

Under the administrative/business division of the Employer's operations are Sales, Development, and Business. According to the Employer's organizational chart, Perin, Mary Evjen, Kathleen Campbell-Nelson, and Gerald Ollison are listed under Development.¹¹ The position of Underwriting Coordinator falls under Sales¹² and the position of Bookkeeper¹³ is

⁸ The parties stipulated to exclude the position of General Manager/acting Program Director, Suzanne White, on the basis that she has the authority to hire, fire, and to discipline employees, and therefore is a supervisor as that term is defined in Section 2(11) of the Act. In view of the parties' stipulation and the record in this case, I shall exclude the General Manager/acting Program Director from the unit.

⁹ Students from Benson High School run the AM program, called "Kid Rhythm Radio" along with the station's volunteers and with limited oversight by Shaun Yu, the Morning Host and Producer. The AM program is not involved in this proceeding.

¹⁰ The station is funded in the following fashion: sixty to seventy percent from its membership, ten percent from the Corporation for Public Broadcasting, fifteen percent from underwriting (sales), and five to fifteen percent from special events and other sources (e.g., wine tastings, boat cruises, etc.).

¹¹ These individuals will be referred to collectively as the Development employees or staff.

¹² According to the documentary evidence, the only position under the "Sales" category is the Underwriting Coordinator, Eric Behny, whom the parties have stipulated is excluded from the bargaining unit based on lack of community of interest in regards to wages, hours, or working conditions. In view of the parties' stipulation, the record, and my analysis below, I shall exclude the Underwriting Coordinator from the unit.

¹³ The record reveals that Ruth Rosimo is the individual with whom the Employer contracts to perform bookkeeping duties. The parties have stipulated to exclude this individual inasmuch as she lacks a sufficient community of interest in regards to wages, hours, or working conditions. In light of the parties' stipulation, the bookkeeper's independent contractor status, and the record as a whole, I shall exclude the bookkeeper from the unit.

listed under Business. The Development staff is primarily concerned with membership support, listener services, and fund raising for the station. In performing their duties, they use Raiser's Edge, a fund raising software program specifically designed for large nonprofit organizations.¹⁴

Under the production/technical division of the Employer's operations are Engineering and Programming. Under Programming, the position of Program Director is vacant.¹⁵ Also under Programming are three on-air hosts and four regular part-time hosts. Under Engineering are the Chief Engineer and the Operations Director/Traffic. The primary function of the Engineering and Programming employees is to broadcast and develop programming and ensure that KBPS transmitting facilities are operating optimally and legally, according to Federal Communications Commission's regulations. These employees all have backgrounds in radio and/or communications. The Engineering and Programming employees use a program called Pro Tools, which is a digital editing system; CBSI, a log-creating system for advertisements and promotional material; and the Music Librarian, a program containing about 15,000 CDs in an electronic version of a library card file.

The Development, Engineering, and Programming staff interacts daily in performing their duties. For example, John Pitman, the Afternoon Host/Music Coordinator, provides Evjen, the Public Relations/Volunteer Coordinator, with details of four different programs, which are played throughout the week at different time slots. Evjen uses this information for *Station Break*.¹⁶ Indeed, Evjen has asked those in Engineering and Programming to submit articles for *Station Break* and will interact back and forth in the course of editing those articles. Ron Ross, Operations Director/Traffic, testified that he discusses work with Development employees about two to three times a day. He also meets with Evjen and White about once a month to outline the on-air programming. Additionally, Campbell-Nelson, Customer Service Representative, and Ollison, Membership Manager, interact with the Engineering and Programming employees to seek responses for inquiries from members. Ross also provides Campbell-Nelson and Ollison with information on weekend music selections and for postings on the Employer's website. Campbell-Nelson also directs inquiries regarding reception or technical matters to Larry Holtz, Chief Engineer. The record also reveals that there is significant e-mail communications between the Development, Engineering, and Programming staff, which contact cover questions ranging from names of artists and pronunciations to program content. When the Engineering and Programming employees have computer related questions or problems, they will go to Holtz whereas the remaining employees typically go to Ollison or Perin.¹⁷

With regard to meetings, all employees attend weekly staff meetings. The Engineering and Programming employees also meet separately every other Wednesday with White regarding on-air programming while the Employer's other employees do not meet separately with White.

The Employer's entire work force participates in pledge drives and other station events. During pledge drives, on-air hosts are expected to pitch, or ask listeners for money, and all

¹⁴ The Bookkeeper uses QuickBooks, and Evjen and Perin also use a desktop publishing system.

¹⁵ White is currently performing the work of both the General Manager and Program Director positions. However, the parties did not address whether the Program Director position would be filled at any time in the future.

¹⁶ *Station Break* is an eight to ten page monthly newsletter mailed to all members of KBPS to inform them of the station's programs and events.

¹⁷ The reason for this appears related to Engineering and Programming's utilization of software or computer programs which is different from that utilized by the Employer's other employees.

Development employees help organize and staff these events.¹⁸ Additionally, during the station's "Top 100 Countdown," everyone at the station gets involved one way or another. For example, Ollison sets up the link to the website where listeners can enter their five favorite pieces of music. Yu then compiles the e-mails from listeners that come through the website for tabulation. Finally, Ollison, Perin, and Yu contact members through direct mail regarding their selections. Similarly, all are involved in the production of the "Young Talent Search," an annual contest wherein the station invites young musicians to submit tapes or CDs.¹⁹ Contact between all unit employees is frequent during events and functions such as the winter holiday party, summer picnic, wine tastings,²⁰ and birthday celebrations. Moreover, when a volunteer expresses an interest in programming, Evjen will send that person on to Pitman, who will train and oversee the volunteer for programming or other duties in that regard. Often, the decision to place a volunteer in programming is not Evjen's sole decision but rather a collective decision among the staff.

The Employer is governed by a sixteen-member board of directors that sets policy, which is implemented by White. White is the Employer's only manager and she and Perin are the only supervisors. The three disputed Development employees have their own immediate supervision in Perin while Engineering and Programming employees are supervised directly by White. However, White retains some authority over Development employees with, at least, regard to approving leave requests.

The record discloses that the Employer is heavily dependent on individuals who volunteer their time and expertise to the Employer's operations and its employees. The number of employees and job duties has not changed since the Employer purchased the station from Portland Public Schools. All employees are on a fixed hourly schedule with various shifts.²¹ All the employees at the station are paid hourly except for Perin, White, and Behny, who are paid a salary. All hourly employees turn in time sheets to White and are eligible for overtime pay for work beyond forty hours in a given week. They are all paid different hourly wages depending on position and seniority. White testified that they have plans to install a time clock system, which would apply equally to all employees.²²

All employees, whether salaried or hourly, are subject to the same Human Resources Policies Manual, which contains the Employer's policies, rules and regulations. All the employees receive the same fringe benefits and are under the same health care plan, retirement plan, vacation scheme, and policy for time off for bereavement or sick leave.

B) Disputed Development Employees

¹⁸ About 200 volunteers staff the pledge drives.

¹⁹ The winner of that contest receives a prize, an on-air interview, and a chance to perform at the station's annual Mother's Day recital.

²⁰ The wine tasting events are typically held at wineries and sometimes generate funds for the station.

²¹ Most of the Engineering and Programming employees work according to their program schedule. For example, the morning host, Shaun Yu, works from 5:00 a.m. to 1:00 p.m.; Robert McBride works from 9:00 a.m. to 5:00 p.m. as the midday host; and John Pitman works from 12:00 p.m. to 8:00 p.m. as the afternoon host. Ron Ross, Operations Director also in charge of Traffic, works from 7:30 a.m. to 4:00 p.m. Larry Holtz, Chief Engineer, works various shifts. White works from 8:00 a.m. to 5:00 p.m. (or 7:30 a.m. to 4:30 p.m.). As for the Development staff, all have various schedules as noted below.

²² The record is silent on whether the time clock system would apply to the salaried employees.

The Development positions in dispute are the Public Relations/Volunteer Coordinator, the Customer Service Representative, and Membership Manager.

1) Mary Evjen, Public Relations/Volunteer Coordinator

Evjen has been with the station for the last five years and works from 9:00 a.m. to 2:30 p.m. for a total of twenty-five hours a week. She shares offices with the Customer Service Representative (Campbell-Nelson) and the Membership Manager (Ollison). Evjen testified that it is rare that anyone assigns her tasks, but that if there is any major problem or if she needs to request days off, she approaches White on such matters. Recently, she met with Perin to set goals and objectives for her position, but not with the understanding that he was her supervisor.²³

In her role as Public Relations Coordinator, Evjen produces and edits *Station Break*, sends out weekly e-mails to the station's membership,²⁴ and writes all announcements to the press regarding station activities and programming. Evjen is accountable for all production facets of *Station Break*, including long-term and short-term planning, content decision, ongoing writing responsibilities, and for soliciting staff to draft articles for *Station Break*. Evjen puts together the appropriate programming for the on-air hosts on a weekly basis.²⁵ She consults with the Engineering and Programming staff once or twice a day regarding programming,²⁶ and more frequently if there are any mistakes or last minutes changes in the programming content. The parties' witnesses did not specify the amount of work time Evjen is in contact with Engineering and Programming employees. Evjen testified that while she discusses the program content with Ross, she does not dictate what eventually goes into the program.

Next, Evjen is expected to balance the needs of the station with the individual personalities of a large unpaid volunteer force.²⁷ To achieve this end, Evjen is responsible for recruiting, training, staffing, and overseeing all station volunteers. When the volunteers work with Engineering or Programming, oversight rests with those employees. Evjen is the primary contact for any new volunteers and will call on volunteers when the need arises.

In addition to her main duties as Public Relations Coordinator and Volunteer Coordinator, Evjen participates in major station activities such as pledge drives, benefit performances, and other fund raising activities. She does not solicit contributions (pitching) during pledge drives or during on-air programming.

2) Kathleen Campbell-Nelson, Customer Service Representative

Campbell-Nelson was originally hired as a secretary, but her job has evolved over the last five years into her current role as Customer Service Representative. Her hours at the station are 8:00 a.m. to 3:00 p.m. with every other Monday off. Campbell-Nelson reports to Perin on data entry matters and to White on all other matters.

²³ Evjen testified that this meeting took place some time after the Petitioner filed the instant petition.

²⁴ White testified that as a listener-supported radio station, communicating with listeners is vital to the station's operation.

²⁵ It is unclear from the record what exactly is entailed when Evjen puts together the programming for the on-air hosts.

²⁶ It is unclear whether "programming" here refers to the on-air program or *Station Break*.

²⁷ Volunteers are an integral part of the programming, especially during pledge drives.

Campbell-Nelson's primary duties entail responding to listeners' questions, identifying problems that need to be solved and passing them along, as she deems appropriate. All customer e-mails regarding classical music are directed to Campbell-Nelson. She also performs data entry using Raiser's Edge.

In addition to her primary duties in customer service, Campbell-Nelson edits and writes articles for *Station Break*, oversees and trains volunteers at the reception desk, does artwork for posters and *Station Break*, orders and purchases materials for the office,²⁸ makes bank deposits, and works with the bookkeeper regarding invoices and orders. Additionally, she coordinates the table events at concerts by getting volunteers and materials together and by creating signs and posters. Campbell-Nelson does not have any role in the development of the on-air program or in the music selection.

3) Gerry Ollison, Membership Manager²⁹

Ollison has been at KBPS for approximately five years.³⁰ His primary job is to take care of all direct mail from members and maintain the station's membership database. He is also responsible for payroll and maintaining the station's website. His work schedule is from 7:00 a.m. to 5:00 p.m., four days a week. He testified that Perin is his supervisor.

Ollison performs direct mail marketing, maintains the membership records, performs all data entry functions in Raiser's Edge, oversees Campbell-Nelson and volunteers with regard to data entry tasks,³¹ processes checks from contributors, and sends out acknowledgement letters to contributors. Ollison sometimes receives questions and comments from the listening audience on reply cards,³² which he usually directs to Pitman or Shaun Yu, the Morning Host and Producer. Likewise, when a contribution comes in the mail with a letter, Yu stated that he sends it on to Ollison. The data entry component of his job entails entry of gifts such as financial pledges of support. Ollison also assists members with account information and any corrections over the phone or through e-mail.

Pitman testified that if he will be out for a few days and misses the Thursday night "Request Line," he asks Ollison to redirect request night e-mails to White, who will then gather the CDs to play that evening. Overall, Ollison describes his contact with the Engineering and Programming employees as "very miniscule," and he rarely finds himself going to their work area.

²⁸ If Campbell-Nelson needs help with picking up office supplies, she asks Holtz since he and White are the only ones authorized to use the Employer's credit card. The supply pick-ups occur about three times a month.

²⁹ According to *Employer's Exhibit 3*, Ollison's title appears to be that of "Membership Associate."

³⁰ White testified that the hiring committee under the Portland Public Schools hired Ollison. However, she refers to this time period as the time in which the Employer took over the station. As such it appears she is referring to the December 16, 2003 purchase of KBPS, which would be inconsistent with Ollison's testimony that he has been with the station for five years.

³¹ During the hearing, the parties stipulated that Ollison is not a supervisor within the meaning of Section 2(11) of the Act. The record establishes that he merely provides Campbell-Nelson his expertise with regard to data entry and there is no evidence of the possession and/or exercise of Section 2(11) indicia in this regard.

³² Ollison also refers to reply cards as "donation" cards.

Ollison is also in charge of recording and filing monthly employee hours for payroll purposes.³³ In so doing, Ollison frequently asks employees for their timesheets and informs them of the payroll cut off or how to classify their time off. Employees also ask Ollison about any discrepancies in their paychecks although he does not necessarily resolve the issue(s) himself.

Ollison is also the station's Webmaster. He is responsible for updating and revising the station's website and for adapting and configuring programs for interactive online use by site visitors.³⁴ Ollison will sometimes discuss with Holtz ways in which to improve the efficiency of the office through the computer network.

Ollison spends one to two percent of his time on major events, such as the "Top 100 Countdown" or the "Young Talent Contest." Yet he testified that if something needs to be done, he is still a part of the puzzle. During pledge drives, Ollison does not do any pitching.

C) Mark Perin, Development Director (Disputed Supervisory Position)

The parties also dispute the supervisory status of Mark Perin, the Development Director.³⁵ Perin has been at KBPS for about five and a half years. He was hired under the Portland Public Schools as a "03" employee, which according to White, is the category used for supervisors, lawyers, doctors, managers, principals, and the like. White considers Perin the general supervisor for the development department.³⁶ In his capacity as Development Director, Perin oversees the overall development plan or fund raising. Specifically, Perin is in charge of events, planned giving, a major donor program, the capital campaign, working with sales in negotiating transactions with vendors and helping to supervise all employees and volunteers in development. At the various events, Perin is responsible for obtaining equipment and he is involved in discussions with Evjen and Campbell-Nelson about the need and use of volunteers.

1) Authority to Hire, Retain and Promote, or to Effectively Recommend Such Action

The record reveals that some time after the purchase of KBPS but before the Petitioner filed the instant petition in February, 2004, White told Perin he now has the authority to hire and fire employees in his department, which includes Evjen, Campbell-Nelson and Ollison. White stated that she had the same conversation with Perin again after the petition was filed. White testified that until the Employer purchased the station, Portland Public Schools possessed and exercised such authority.³⁷ As a result of the Employer's purchase of the station, it has taken

³³ During the representation hearing, White testified that she is working to get Ollison out of payroll duties.

³⁴ For example, Ollison has created a form for listeners to use online for the "Top 100 Countdown," a year-end event wherein the station invites listeners to submit their five favorite pieces of music for a countdown of the musical pieces with the most votes. Additionally, when Pitman learns of a website link for an arts group that may be of interest to the audience, he will forward it on to Ollison to put on the website.

³⁵ Perin did not testify at the representation hearing.

³⁶ White testified that Perin's current job description does not reflect his various supervisory authorities, but she plans to revise the job description to include such authority. The parties did not provide a copy of Perin's current job description at the hearing.

³⁷ White further testified that when Portland Public Schools owned KBPS, a hiring committee made up of both the Portland Public Schools and others from the station, made hiring and firing decisions. It is not clear from the record exactly who sat on the hiring committee, but White stated that the committee met,

over the authority to hire and fire employees. According to White, the hiring policy in the Human Resources Policies manual provides that the authority to hire and fire rests with the General Manager.³⁸

White testified that about a year ago, Perin made recommendations regarding wage increases and adding hours for Campbell-Nelson and Ollison. There is no evidence that White conducted an independent investigation based on Perin's recommendations. At the time, White stated that they were under the collective bargaining agreement with PFTCE and therefore could not implement any wage increases. However, she followed Perin's recommendations regarding increasing Campbell-Nelson and Ollison's hours.

2) Authority to Assign and Responsibly Direct

White testified that Perin assigned Evjen various tasks related to press releases, *Station Break*, and volunteers. The record indicates that Perin directs Evjen on more technical matters, provides her "expertise" so she can run her membership database, and has shown her the nuts and bolts of using the e-mail system for data entry purposes. Perin also directs Campbell-Nelson on how much time she should be spending with data entry, monitors how many entries she has entered, and sometimes directs her to work extra hours without prior consultation with White. Lastly, Perin works with Ollison in turning development goals into strategies. For example, Perin has told Ollison what he should do with respect to increasing membership percentages. Ollison testified that he would not put anything on the station's website without initially obtaining Perin's approval. Ollison also testified that he requests time off from Perin.

3) Other Duties and Responsibilities

During the conversations with Perin before and after the Petitioner filed the instant petition, White also told Perin he now has the authority to discipline and evaluate³⁹ development employees. White testified that Perin could have disciplined employees but that there has been no need for discipline and, thus, the issue never came up. Perin has made comments to White about Campbell-Nelson's performance. The record reveals that years before the Employer's purchase of KBPS, Perin may have assigned customer service duties to Campbell-Nelson. However, the record does not disclose the extent and nature of his authority regarding such assignments and whether Perin possesses the same authority following the purchase.

White testified that Perin generally does not approve any vacation for Evjen, Campbell-Nelson or Ollison but that such authority, along with approving time off, may be passed on to Perin. However, White was unsure whether it was she or Perin who approved Evjen's recent vacation.

With the exception of the Development employees, White testified that she directly supervises and evaluates the balance of the Employer's employees.

interviewed candidates, and rated them. Portland Public Schools made the final decisions in hiring. I note that Ollison testified that when he was hired, White, Perin, and a board member interviewed him.

³⁸ A closer reading of the hiring policy, however, reveals that White's testimony is not entirely accurate. The manual further provides, "The supervisor has the responsibility to determine whether an applicant is technically qualified for the open position and meets the other job-related criteria necessary to perform the job. The decision whether to hire the applicant is initially made by the supervisor, but must also have the approval of the General Manager."

³⁹ The next performance appraisal will not take place until January 2005.

4) Secondary Indicia

Both Campbell-Nelson and Ollison testified that they have always considered Perin their supervisor, and that nothing has changed since the Employer took over KBPS. Ollison testified that he considers Perin his direct supervisor and that White informed him a long time ago that Perin was his supervisor. In contrast, Evjen stated that she was never aware that Perin was a supervisor and did not believe that Perin was acting in a supervisory capacity when she met him about a month ago to set goals and objectives. Subsequent to the Employer's purchase of the station, no one has told Evjen, Campbell-Nelson or Ollison that Perin would now have the authority to hire, fire, discipline, and evaluate them.

III) POSITIONS OF THE PARTIES

As noted above, the Petitioner essentially is seeking to include all employees working in Development, Engineering, and Programming while excluding the sales/Underwriting Coordinator employee, independent contractor/bookkeeper, and the Development Director (Mark Perin). The Employer contends that the three disputed Development employees (Ollison, Evjen and Campbell-Nelson) are office clericals and, thus, do not share a sufficient community of interest with unit employees and should be excluded from the unit. To the contrary, the Petitioner claims that Ollison, Evjen and Campbell-Nelson are plant clericals who should be included in the unit and, alternatively, if they are found to be office clericals, they nevertheless share a sufficient community of interest with unit employees warranting their inclusion in the unit.

With respect to Development Director Mark Perin, the parties stipulated to his exclusion from the unit on the basis that he does not possess a sufficient community of interest with unit employees. However, the parties have requested that I make a determination on Perin's supervisory status. The Employer contends that Perin is a supervisor within the meaning of Section 2(11) of the Act and, thus, should be excluded from the unit on this additional basis. On the other hand, the Union contends that Perin does not possess indicia of supervisory authority as that term is defined in Section 2(11) of the Act.

IV) ANALYSIS

A) Unit Determination Regarding Evjen, Campbell-Nelson, and Ollison

While the parties have articulated the unit determination issue regarding the Development employees in terms of an office clerical versus plant clerical argument, the record evidence reveals that Petitioner is essentially seeking a plant-wide unit.⁴⁰ In resolving unit

⁴⁰ As noted above, I approved the parties' stipulation to exclude the sales employee (Underwriting Coordinator), Eric Behny, from the unit because he lacks a community of interest with unit employees. The Board has long recognized that sales employees are typically excluded from a plant-wide unit because they have interests that are typically diverse from employees in a plant-wide unit. *Plaza Provision Co.*, 134 NLRB 910 (1961); see also *NLRB v. Tallahassee Coca-Cola Bottling Co.*, 381 F.2d 863 (1967). See *Central Casket Co.*, 225 NLRB 362 (1976); *Border Steel Rolling Mills, Inc.*, 204 814 (1973). In view of the parties' stipulation regarding the sales employee and my finding below that Perin,

determination issues, it is well established that the Board need not determine the *only* appropriate unit, or the *ultimate* appropriate unit, or the *most* appropriate unit; the Act requires only that the unit be *an* appropriate unit. See *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951); *Omni International Hotel*, 238 NLRB 475 (1987). Moreover, Congress expressly contemplated the plant-wide unit in Section 9(b) of the Act and the Board has held that a “plant-wide unit is presumptively appropriate under the Act, and a community of interest inherently exists among such employees.” *Kalamazoo Paper Box Corp.*, 136 NLRB 134 at 136 (1962); see also *Airco, Inc.* 273 NLRB 348, at 349 (1984); *Livingston College*, 290 NLRB 304, 305 (1988); *Ippolito*, 313 NLRB 715, 717 (1994), *enfd.* 150 LRRM 2575 (3rd Cir. 1995); *Marks Oxygen Co. of AL*, 147 NLRB 228 (1964). The only times the Board has not found such units appropriate is under unusual circumstances where an employer had demonstrated “that the interests of a given classification are so disparate from those of other employees that they cannot be represented in the same unit.” *Airco, Inc.*, 273 NLRB at 349. Thus, while the community of interest standard is the same, the burden is placed on the Employer to demonstrate that the interests of a given classification are so disparate from those of other employees that they cannot be represented in the same unit. *Id.*

Here, the Employer has failed to meet its burden. In particular, the record reveals that the three Development employees work in the same building where all unit employees regularly have frequent contact due to the relatively small size of the Employer's facility and due to the interaction the Employer's relatively small workforce necessarily has in developing, producing, and providing the Employer's products and/or services to the public. In this regard, I note that Evjen could not produce the monthly publication, *Station Break* without contacting and interacting with the Programming employees. Indeed, it is through this collaboration, in part, that the Programming employees settle on the programs that are actually aired during the Employer's broadcasts. Such contacts and interaction are also critical to Campbell-Nelson in the performance of her duties related to overseeing proper utilization of the volunteers working in the Employer's operations and critical to Ollison's handling of inquiries from the Employer's listening audience.⁴¹

With respect to supervision, General Manager White directly supervises the Programming and Engineering employees and, has by her own testimony only recently vested certain supervisory authority with Perin in connection with supervising the Development staff. Thus, White necessarily retains certain immediate supervision over Development employees, as she is the only other supervisor remaining in the Employer's operations besides Perin.⁴² In this regard, I note that the Employer's only two supervisors, White and Perin, supervise a relatively small staff of approximately 13 employees.

With respect to functional integration, the record reveals that Development, Engineering, and Programming employees work closely with each other on the myriad of fund raising and listener outreach efforts that the Employer necessarily must engage in due to its heavy

the Development Director, is a 2(11) supervisor as defined in the Act, the Employer's employees in Development, Engineering and Programming, constitute the balance of all the Employer's employees and, thus, constitute a plant-wide unit.

⁴¹ Thus, the Employer's suggestion that the Development employees' contacts and/or interchange with the Engineering and Programming employees are mostly voluntary, social and/or personal in nature, is simply not supported by the record.

⁴² For instance, I note that White generally retains the authority to approve employee leave requests for Development employees.

dependence on such efforts for its major source of revenues.⁴³ Additionally, the record reveals that each of the Development employees develops and plays a key role in the overall product the Employer provides to its listeners and contributors. For instance, Evjen is primarily responsible for producing *Station Break*, which is one of many key services in addition to on-air broadcasts provided by the Employer to its listening public. Because *Station Break* sets forth the on-air programming and a myriad of fund raising and outreach events provided by the Employer, Evjen must necessarily work closely with Programming employees to insure that *Station Break* comports with the actual broadcasts aired by the Employer. Campbell-Nelson also works closely with Evjen in producing *Station Break* and additionally oversees the Employer's volunteer program which is integral to assisting all unit employees with carrying out their duties and responsibilities. In this regard, Campbell-Nelson works with Engineering and Programming employees to insure that they are provided with the appropriate volunteer assistance when the need arises. Campbell-Nelson is also regularly assigned to work on the multiple fund raising and outreach events conducted by the Employer. While it appears that Campbell-Nelson's duties and responsibilities may include clerical functions, especially as it relates to assisting Ollison with data entry, the record reveals that such functions represent only one task of many performed by Campbell-Nelson. The same holds true for Ollison, who while providing significant clerical work in terms of data entry and payroll functions, is also responsible for assisting with fund raising and outreach efforts and is primarily responsible for developing, revising, and updating the Employer's website, which the record clearly notes is important to the success of the Employer's operations. Indeed, the website provides public critical feedback to the Employer regarding the services it provides.⁴⁴ In sum, the Development employees develop, produce and/or provide a number of services and/or products that are part and parcel of the wide array of services and products provided by the Employer to the public.

In the television and radio industry, either an overall program department unit or separate units of (1) employees regularly and frequently appearing before the microphone, and (2) employees who do work preliminary to broadcasts or telecasts, may be appropriate. *Radio & Television Station WFLA*, 120 NLRB 903 (1958). Where no labor organization is seeking to represent the performing and nonperforming employees separately, a single unit of the program department employees is appropriate. *Id.* See also *El Mundo, Inc.*, 127 NLRB 538 (1960). Consistent with this principle, employees directly involved in the staging and presentation of studio productions, including both those who perform on radio and television programs and those who contribute directly to such performances, constitute essentially a production and program unit. Their functional interrelationships create a substantial community of interest and render the combined unit appropriate. *WTAR Radio-TV Corp.*, 168 NLRB 976 (1968). Moreover, a unit consisting of employees in the engineering and program departments of a television or radio station who contribute to the presentation of but do not appear on the TV or radio programs is also appropriate. *KMTR Radio Corp.*, 85 NLRB 99 (1949); *Indiana Broadcasting Corp.*, 121 NLRB 111 (1958). A broadcasting station's production department alone does not constitute an appropriate unit when employees in another department (e.g., program planning) are essentially production employees and work in close contact with the employees in the production department proper. In such a situation, without the program

⁴³ In this regard, I also note that the record reveals sufficient evidence to establish that there is also significant interchange between all unit employees during events such as the annual "Young Talent Search," where all participate by acting as ushers, hosts, and by coordinating volunteers, making signs, and by engaging in setup work surrounding these and similar events.

⁴⁴ Such feedback relates to volunteers' interest, which is critical to the Employer's ability to provide its services and broadcasts to the public, and relates to listener inquiries and/or complaints regarding reception problems and to outreach programs and services.

planning employees, the production department constitutes only a segment of an appropriate unit. *WTVJ, Inc.*, 120 NLRB 1180, 1188 (1958). Here, “Development” within the Employer’s operations is synonymous with the terms “planning” and/or “production” in the television and radio industry cases noted above.

Moreover, the instant record clearly establishes that Development employees are functionally integrated in the Employer’s relatively small operations, along with Engineering and Programming employees, to provide a myriad of services to the public centered on broadcasts. Notably, the Morning Host Producer, Shaun Yu, testified that as a listener-supported radio station, the interaction of those working in public relations, on the newsletter, and membership is critical to the station’s production. Even White agreed that as a listener-supported radio station, communicating with listeners is vital to the station’s operation. Such vital communications are performed, in large part, by the Development employees as well as by the employees who put on the actual radio broadcasts.

The record also reveals that Development employees share a community of interest with Engineering and Programming unit employees in that all unit employees are paid an hourly wage, are subject to the same Employer policies, vacation/leave scheme, and are provided the same benefits.

In light of the foregoing and the record as a whole, the Employer has not met its burden of establishing that the interests of the Development employees are so disparate from the Engineering and Programming employees that the Development employees cannot be represented in the same unit. Rather, I find that the plant-wide unit of all Development, Engineering, and Programming employees is appropriate in the circumstances of this case.

The Employer, in its oral argument, cites a number of cases for the proposition that the Development employees are office clerical employees. However, those cases are not applicable here because the record clearly establishes that while the Development employees perform some clerical functions incidental to their work or such functions represent a portion of their work, these three employees are also responsible for developing and providing certain critical services and products to the listening public as are the Engineering and Programming employees. Based on the above and the record as a whole, I find that the Development employees are not office clericals.⁴⁵

⁴⁵ In this regard, I note that the Board has stated, “the distinction between office clericals and plant clericals is not always clear.” *Hamilton Halter Co.*, 270 NLRB 331 (1984). “The indispensable and conclusive element is that the asserted plant clericals ‘perform functions closely allied to the production process or to the daily operations of the production facilities at which they work.’” *Desert Palace, Inc.*, 337 NLRB No. 70 (2002) (quoting *Cook Composites & Polymers Co.*, 313 NLRB 1105 (1994)). The test generally is whether the employees’ duties are related to the production process (plant clericals) or related to general office operations (office clericals). *Id.* Typical plant clerical duties are timecard collection, transcription of sales orders to forms to facilitate production, maintenance of inventories, and ordering supplies. See *Hamilton Halter Co.*, 270 NLRB 331. Plant clerical employees included in a plant-wide unit generally share a community of interest with the employees in the unit. *Raytec Co.*, 228 NLRB 646 (1977). In contrast, typical office clerical duties are billing, payroll, phone, and mail. *Dunham’s Athleisure Corp.*, 311 NLRB 175 (1993). Pursuant to well-established decisional doctrine, plant-wide bargaining units, excluding office clerical employees, guards and supervisors, have long been considered presumptively appropriate for collective-bargaining purposes. See *Central Casket Co.*, *supra*.

The Employer further contends that in the broadcasting industry, the Board has found that administrative business employees who are not directly involved with the production process should be excluded from a production unit due to lack of community of interest. See *Taft Broadcasting Co.*, 226 NLRB 540 (1976). However, the facts in that case are distinguishable from those present in this case. In particular, Development employees are directly and integrally involved in the development and providing of the vast array of services and/or products provided by the Employer to the public as are the Programming and Engineering employees.

Finally, the Employer contends that the prior bargaining history should be controlling. Typically, prior bargaining history is given substantial weight because the Board is reluctant to disturb a unit established by collective bargaining, which is not repugnant to Board Policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. *Red Coats Inc.*, 328 NLRB 205 (1999). The rationale for this policy is based on the statutory objective of stability in industrial relations. See *Hi-Way Billboards*, 191 NLRB 244 (1971). As in many areas of substantive law, exceptions are made to the general rule. For instance, the bargaining history of a group of employees in a plant does not control the unit determination for every other group of unorganized employees in the plant. *North American Rockwell Corp.*, 193 NLRB 985 (1971). Here, the collective bargaining history is not given the same weight because the prior collective bargaining agreements were in effect when the employees were public employees of the Portland Public Schools and were represented by unions that apparently only represent public sector employees. Moreover, there is nothing in the record that reveals how the two separate units came about. Thus, the record in this case does not warrant giving controlling weight to the bargaining history raised by the Employer, particularly in view of the Board's presumption in favor of plant-wide units.

In view of the above and the record as a whole, I shall include the Development employees (Membership Manager, Public Relations/Volunteer Coordinator, and Customer Service Representative) in the unit.

B) Supervisory Status of the Development Director

As noted above, the Employer contends that Perin is a supervisor as that term is defined by Section 2(11) of the Act while the Petitioner maintains that the Employer has not met its burden of establishing that Perin possesses supervisory authority. I find Perin is a supervisor within Section 2(11).

The term "supervisor" is defined in Section 2(11) of the Act as follows:

[A]uthority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. §152(11).

It is well settled that Section 2(11) of the Act is to be read in the disjunctive and that possession of any one of the enumerated indicia establishes supervisory status as long as the performance of the function is not routine or clerical in nature but rather requires a significant degree of independent judgment. *Stephens Produce Co., Inc.*, 214 NLRB 131 (1974); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). Independent judgment occurs

when a supervisor makes decisions independent of consultation with higher management. *Phillips Industries, Inc.*, 295 NLRB 717, 735 (1989). However, “[T]he Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights, which the Act is intended to protect.” *Hydro Conduit Corp.*, 254 NLRB 433 (1981). “A worker is presumed to be a statutory employee and the burden of providing a worker is a supervisor within the meaning of Section 2(11) of the Act falls on the party who would remove the worker from the class of workers protected by the Act.” *Hicks Oil & Hickgas, Inc.*, 293 NLRB 84 (1989); *Kentucky River*, *supra*.

Here, the record reveals that before and after the instant petition was filed, White advised Perin that he was being vested with the authority to hire, fire, and to discipline employees.⁴⁶ White further testified that the reasoning for the recent assignment of authority was due to and followed the Employer’s December 16, 2003, purchase of its operations from the Portland Public Schools. The record reveals that prior to the Employer’s purchase, hiring matters at the radio station were handled by the Schools pursuant to a particular process. While it is clear from the record that Perin has not had the opportunity to hire, fire, and/or to discipline employees since the recent purchase, “[t]he rule clearly is established in Board precedent that *possession* of authority consistent with any of the indicia of Sec. 2(11), is sufficient to establish supervisory status, even if this authority has not yet been exercised.” *Fred Meyer Alaska, Inc.*, 334 NLRB 646, fn. 8 (2001).

White further testified that Perin is responsible for directing and assigning the work of the Development employees. While Evjen testified that she did not receive assignments or direction from Perin and that she did not consider him to be her supervisor, that testimony was in sharp contrast to the testimony of Campbell-Nelson and Ollison. Campbell-Nelson testified that Perin directs her with regard to the amount of time she spends performing data entry work concerning Development matters and even directs her to work overtime when necessary in this regard. Ollison testified that he will not make changes to the Employer’s website without seeking prior approval from Perin. Indeed, Campbell-Nelson and Ollison testified that they consider Perin to be their supervisor with regard to their work.⁴⁷ The Board has held that persons, who have the authority to assign work, move employees from one task to another, and

⁴⁶ The record also reveals that White told Perin he was being vested with the authority to evaluate employees. However, the Employer did not elaborate on the nature and extent of authority underlying Perin’s evaluation of employees. Preparing evaluations that do not lead directly to personnel actions, which affect either the wages or job status of employees, does not rise to the level of the exercise of supervisory authority. *Williamette Industries, Inc.*, 336 NLRB No. 59 (2001); *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535 (1999); *Vencor Hospital*, 328 NLRB 1136 (1999); *McAlester General Hospital*, 233 NLRB 589, 591 (1977). Thus, vesting Perin with the authority to evaluate, without more, does not confer supervisory status.

⁴⁷ The Board has held that where “the possession of any one of the [12 listed supervisory characteristics] is not conclusively established or “in borderline cases,” the Board looks to well established secondary indicia, including the individual’s job title or designation as a supervisor, attendance at supervisory meetings, job responsibilities, authority to grant time off, etc., where the individual possesses a status separate and apart from that of rank-and-file employees.” *Property Markets Group, Inc.*, 339 NLRB No. 32, slip op. at 11 (2003). See also *Monotech v. NLRB*, 376 F.2d 514 (1989) and *Palagonia Bakery Co., Inc.*, 339 NLRB No. 74 (2003). The Board has also held that secondary indicia alone will not support a finding of supervisory status. See *Property Markets Group*, 339 NLRB at 11. Here, the record reveals secondary indicia of Perin’s supervisory authority including the following: he receives a salary and he has been held out to employees as a supervisor by the Employer.

to grant leave requests and/or overtime, have been held to be supervisors under the Act.⁴⁸ See *Louisiana Gas Service Co.*, 303 NLRB 908 (1991) and *Leyendecker Paving, Inc.*, 247 NLRB 28 (1980).

Moreover, Perin recently recommended adding work hours for Campbell and Ollison. That recommendation appears to have been followed without an independent investigation by White. Persons with the power “effectively to recommend” the actions described in Section 2(11) are supervisors within the statutory definition. See, e.g., *Entergy Systems & Service*, 328 NLRB 902 (1999); *Detroit College of Business*, 296 NLRB 318 (1989); and *Westwood Health Care Center*, 330 NLRB 935 (2000). Here, Perin’s effective recommendation had the impact of materially effecting Campbell-Nelson and Ollison’s total wages and hours.

On the basis of the foregoing, I find that Perin possesses the authority to hire, fire, discipline, assign, responsibly direct employees, and to grant overtime. Accordingly, Perin falls within the definition of Section 2(11) of the Act and shall be excluded from the unit.

V) CONCLUSION

In light of my findings above and the record as a whole, I shall direct an election in the following appropriate unit (hereinafter “Unit”):

All full-time and regular part-time employees employed by the Employer at its facility located at 515 NE 15th Avenue, Portland, Oregon; excluding all sales/Underwriting Coordinator employees, independent contractor bookkeeping employees, volunteers, guards, and supervisors as defined by the Act.

There are approximately twelve employees in the Unit.

VI) DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board’s Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall

⁴⁸ With regard to approving leave requests, Ollison testified that he submits his leave requests to Perin for approval. However, the other Development employees apparently go through White for such matters.

vote whether or not they desire to be represented for collective bargaining purposes by International Brotherhood of Electrical Workers, Local 48, AFL-CIO, CLC.

A) List of Voters

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Portland Subregional office located at 601 SW Second Avenue, Suite 1910, Portland, Oregon, 97204-3710, on or before April 2, 2004. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B) Notice Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C) Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 9, 2004.

DATED at Seattle, Washington, this 26th day of March 2004.

/s/ Richard L. Ahearn
Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
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Seattle, Washington 98174